

No. 3070

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IN THE

United States Circuit Court of Appeals
For the Ninth Circuit

SHIP OWNERS AND MERCHANTS TUGBOAT COMPANY
(a corporation), owner of the steam tugs
"Dauntless" and "Hercules",

Appellant,

VS.

HAMMOND LUMBER COMPANY (a corporation),
Appellee.

BRIEF FOR APPELLANT.

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BRIEF FOR APPELLANT.

I.

STATEMENT OF THE CASE.

This matter comes before this court on an appeal from a decree of the District Court of Oregon, dismissing appellant's petition for a limitation of liability on appellee's motion to dismiss and exceptions to the petition.

The petition for limitation of liability showed that on the 9th day of September, 1911, a large raft of piling, belonging to appellee, broke loose from the tugs "Dauntless" and "Hercules", belonging to appellant,

while being towed out of the Columbia River on a voyage to San Francisco, and thereupon became practically a total loss on Peacock Spit at the entrance to said river.

Following said loss, and on November 9, 1911, appellee commenced an action against appellant in the Circuit Court of Clatsop County, State of Oregon, wherein it prayed judgment in the sum of \$71,249.90 as the value of said raft.

Thereafter, and on the 27th day of February, 1912, appellant filed in the United States District Court for the Northern District of California, its petition for a limitation of liability on account of all losses and damages to property done, occasioned or incurred upon the said voyages of said tugs, and particularly for the loss of said raft, and asked that such liability should not be allowed to exceed the value of petitioner's interest in said tug "Dauntless" and her freight if any pending, or if the court should find that liability existed on the part of said tug "Hercules", that such liability should in no event be allowed to exceed the value of petitioner's interest in both of said tugs and their freights, if any, pending at the close of their respective voyages upon which said raft was lost.

Upon the filing of said petition an order was entered referring the cause to the United States Commissioner for the purpose of making due appraisement of the value of the interest of petitioner in said tugs as the same existed at the close of said voyages. Due notice thereof was given appellee, and a hearing for the pur-

pose of said appraisement was held at which appellant and appellee produced evidence as to the value of said tugs. Said commissioner appraised the value of the interest of petitioner in said tug "Dauntless" at the sum of \$45,000, and the value of its interest in said tug "Hercules" at \$70,000. Due notice of the filing of said report was given appellee, and thereafter on March 29, 1912, said report was confirmed by said court, and the value of petitioner's interest in said tugs was fixed at the respective sums of \$45,000 and \$70,000, or a total of \$115,000.

Thereafter, and on July 30, 1912, appellee filed a claim in said limitation proceedings for the loss of said raft in the sum of \$71,249.90, with interest and costs, and on the same day also filed exceptions to the petition and prayed a dismissal of said petition upon the ground that the petition failed to show that the value of said tugs was less than the value of said raft. Argument was heard upon the exceptions, and, on January 10, 1914, the said District Court rendered its decision and entered a final decree dismissing said petition as against appellee upon the ground that if there was any liability at all, both of said tugs being engaged in the same venture, were equally liable, and inasmuch as the value of said tugs exceeded the demands of appellee for the loss of said raft, the proceedings should be dismissed.

Appellant thereupon appealed to this court from said decree, and, on November 17, 1914, this court rendered its decision wherein it pointed out, in its opening statement of facts, that the values of said

tugs "Dauntless" and "Hercules" were of the sums of \$45,000 and \$70,000, respectively, and that the amount of the claim of said Hammond Lumber Company for the value of said raft was the sum of \$71,249.90, and affirmed said decree upon the ground that as the value of said tugs exceeded the amount of the claim of appellee, and as it was inconceivable that any claim other than that of the owner of the raft could possibly arise, the proceedings should be dismissed.

Subsequently, and on the 18th day of November, 1915, the aforesaid cause then pending in the Circuit Court for Clatsop County was brought on for trial, and during the course of said trial appellee amended its complaint by leave of court and enlarged its claim against appellant for the value of said raft from the sum of \$71,249.90 to the sum of \$110,983.13.

After said cause was submitted to the court, leave was taken by appellee to file a brief with said court, and, thereafter, and on the 21st day of June, 1916, a brief was served upon appellant and filed with said court, wherein appellee alleged that its total loss in the destruction of said raft was the sum of \$111,153.22, and claimed in addition thereto interest on said sum from September 9, 1911, at six (6) per cent. per annum. The claim of appellee as thus set forth in said brief, viz.: \$111,153.22, with interest at six (6) per cent. per annum from September 9, 1911, was in excess of the sum of \$140,000, and was greatly in excess of the aforesaid value of appellant's interest in said tugs "Dauntless" and "Hercules" as the same

existed at the close of the respective voyages of said tugs on which said raft was lost, viz. in excess of the aforesaid sum of \$115,000.

Thereby, and for the first time, appellee preferred against appellant a claim in excess of the value of petitioner's interest in said tugs.

Following the making of said claim, and on the 21st day of July, 1916, appellant filed in the United States District Court for the District of Oregon its petition for a limitation of its liability, if any, for the loss of said raft, and, pursuant to an order entered by said court, filed its bond in the sum of \$115,000, being the value of petitioner's interest in said tugs "Dannfless" and "Hercules" as the same were at the close of the voyages of said tugs upon which said raft was lost.

Said petition denied all liability for the loss of said raft, but prayed that in case the liability was found to exist, it in no event should be permitted to exceed the value of appellant's interest in said tugs at the close of said voyages upon which said raft was lost.

Thereafter, and on October 30, 1916, pursuant to a monition which had in due course issued out of said cause, appellee filed an answer to said petition and a claim for the loss of said raft in the sum of \$110,983.13, and also filed exceptions to said petition upon the ground that said petition failed to disclose facts sufficient to warrant a limitation of liability in that (a) it showed the claim of claimant, without interest at the time of the loss of said log raft in said petition pleaded, was less than the value of said tugs at said

time; (b) it showed that there was then pending a proceeding for limitation of liability in the Northern District of California involving the loss of said log raft in which the court, with its equity powers, could have considered the alleged new facts as to the character of claimant's claim; and (c) it did not show that there were any other claims, a necessary prerequisite to the right to limit where the fund exceeds the one claim alleged, and that this was a matter *res adjudicata* between petitioner and claimant by virtue of a decree of the Circuit Court of Appeals in that proceeding entitled *Shipowners and Merchants Tugboat Company v. Hammond Lumber Company*, No. 2388 in said court, and reported in 218 Fed. Rep. 161 at 165.

Subsequently, and on July 20, 1917, appellee filed a motion for a dismissal of said petition for limitation of liability.

Said exceptions and motion were duly argued before said court on the 23rd day of July, 1917, and thereafter on September 10, 1917, said District Court rendered its decision sustaining said exceptions and motion and entered a decree dismissing said petition.

Thereafter, and on the 25th day of September, 1917, appellant prosecuted its appeal to this court. Errors have been duly assigned to said decision and decree of said District Court.

II.

SPECIFICATIONS OF ERRORS.

The errors assigned may be grouped for convenience under the following specifications:

1. The District Court erred in holding and deciding that the claim made by appellee in the Circuit Court of Clatsop County did not exceed the value of appellant's interest in its said tugs "Dauntless" and "Hercules" at the close of their respective voyages on which said raft was lost, and, for that reason, in dismissing the petition herein (Assignment of Errors VIII, XIV, X and XI).

2. The District Court erred in holding and deciding that the limitation of liability proceedings in the District Court for the Northern District of California were as against appellee still pending in that court at the time the petition for limitation of liability in the District Court for Oregon was filed, and in holding and deciding that appellee's remedy was by supplemental petition or otherwise to have appellee brought in and made a party to the limitation proceedings previously instituted by appellant in said District Court for the Northern District of California, and, for that reason, in dismissing the petition herein (Assignment of Errors IV, V, VI and VII).

3. The District Court erred in dismissing the petition herein and in not proceeding to trial upon the issues made by the said petition and appellee's claim and answer thereto (Assignment of Errors I, II, III, XII, XIII and XIV).

III.

ARGUMENT.

Appellee has made a claim in the Circuit Court of Clatsop County in excess of the value of appellant's interest in its tugs "Dauntless" and "Hercules" at the close of their respective voyages on which appellee's raft was lost. The District Court erred in dismissing the limitation proceedings.

As has been pointed out in the statement of facts, the value of appellant's interest in the said tugs "Dauntless" and "Hercules", as the same existed at the close of the voyages on which the said raft was lost, was appraised by the commissioner to whom the matter was referred by the United States District Court for the Northern District of California, and thereafter approved by said court, at the sums of \$45,000 and \$70,000, respectively, or at the total sum of \$115,000. As the value of appellant's interest in said tugs was squarely in issue in the aforesaid proceedings between appellant and appellee, as parties thereto, the appraisement of the commissioner and court of such value thereby became *res adjudicata* as between the parties hereto.

The foregoing rule is elementary. Of it the Supreme Court, in *Southern Pacific R. Co. v. United States*, 168 U. S. 1, 47, said:

"The general principle announced in numerous cases is that a right, question, or fact distinctly put in issue and directly determined by a court of competent jurisdiction, * * * cannot be disputed in a subsequent suit between the same parties or their privies."

Thereafter, during the trial of the action in the Circuit Court of Clatsop County, appellee's complaint was amended and its claim against appellant for the value of said raft was thereby increased from the sum of \$71,249.90 to \$110,983.13. Subsequently the parties to said action filed briefs, and in the brief filed by appellee its demand for damages against appellant was again increased from \$110,983.13 to \$111,153.22 and interest thereon at the rate of six per cent. per annum from September 9, 1911, the date of the loss. After having stated that the total loss to plaintiff (appellee) on the value of the raft in San Francisco was \$111,153.22, appellee made its claim in these words: "*To this should be added interest from September 9, 1911, at six per cent. per annum.*"

The amount which appellee thus claimed from said court for the loss of said raft exceeded the sum of \$140,000, for \$111.153.22, with interest at the rate of six per cent. per annum from September 9, 1911, to July 21, 1916, the date of the filing of the petition, would amount to \$143,609.96.

It cannot be said that the statement in the brief was not a request for an award by the court against appellant of a sum which, if decreed, would have exceeded \$140,000. It is idle, we submit, for appellee to contend that when it used the words of the brief that a demand was not being made upon the Clatsop County court for an award in excess of the value of appellant's interest in said tugs.

Its attempted explanation of its purpose in asserting the demand in its brief is too shallow. In a solemn

document in which it was urging the Circuit Court to award damages it now says that in stating that it "should" have interest—"to this should be added interest", to use its exact words—it only meant to say to the court that it "ought" to have interest, although it now claims that it was not a case in which under any circumstances it was entitled to interest. In other words, on its own explanation, appellee was stating to the court that it "ought" to have something which it knew that it was not entitled to and yet was gratuitously "enlightening" the court without any intent to ask for interest. The brief was not an academic treatise upon the theory of jurisprudence. It was a forceful effort to mulct appellant in damages, and when appellee employed the language it did, it made a plain demand for an amount in excess of \$140,000. No other rational explanation is tenable. The excuse now offered by appellee is worse than none and is illogical to the Nth degree.

It is immaterial that the complaint was not again amended to include the demand for interest, as it has been definitely held that the Oregon courts may allow interest in an action at law even though not prayed for in the complaint.

Rutenic v. Hamaker, 40 Ore. 444; 67 Pac. 192.

That decision cannot be distinguished upon the ground suggested by appellant for it squarely held that in a case where plaintiff is entitled to interest, prayer therefor in the complaint is not necessary. It may be true that under Oregon law, the case at bar

was not one in which interest could be allowed, but that fact is entirely beside the question. The point is that a demand for interest was being made, and *Rutenic v. Hamaker*, *supra*, is an authority for its allowance by the court if the demand was legally proper. The claim was made and thereby jurisdiction in the federal court was established. In the exercise of that jurisdiction, then and only then could the validity of the demand be inquired into.

Nor was the validity of the claim made by appellee open to question by the District Court at that stage of the proceedings in which it dismissed the petition herein. It is immaterial whether the claim as made was good or bad; whether it had any foundation in fact or in law, for it was sufficient to give the court jurisdiction in the limitation proceedings that a claim had been made in excess of the value of petitioner's interest in the tugs at the close of their respective voyages upon which the raft was lost.

For illustration, suppose that prior to the institution of the limitation proceedings had in the District Court for the Northern District of California, demand had been made upon the Shipowners and Merchants Tugboat Company by others than the Hammond Lumber Company for damages resulting to other vessels or fishing nets from the break-up of the raft,* and that such claims, together with that preferred by the Hammond Lumber Company, had been set forth in the petition for limitation of liability! Surely this court will not enunciate the new doctrine that the District

*As appellee now suggests contrary to its contention in this court on the former hearing (Brief p. 31; 218 Fed. 161 at 165).

Court would have had power to have inquired into the validity of such claim for the purpose of determining if it did not have jurisdiction to entertain the limitation of proceedings. Unless violation is to be done to all principles applicable to limitation proceedings and to logic, this court must hold that it is enough to create jurisdiction that claim has been made in excess of the value of petitioner's interest in said tugs. The District Court for Oregon had no more authority to inquire into the validity of the claim which was made by appellee in its brief in the Circuit Court than the District Court for the Northern District of California would have had in the case stated. It seems undeniable that if the District Court for Oregon had power to inquire into the validity of the claim made upon the Circuit Court, then that that power must extend to an inquiry upon any ground upon which a claim may be without merit.

The District Court would have just as much power to pass upon the merit of the claim as fact of negligence as matter of law, for if it had power to make inquiry at all at that stage of the proceedings, there could be no limitation of its power. Any other position we submit is illogical. And yet this leads us to the absurdity of saying that the District Court has jurisdiction in the limitation proceedings for the purpose of passing upon the merits of a claim in order that it might be determined whether or not it has jurisdiction to entertain the proceedings at all. The error of such position is too manifest for words.

This being true, it is immaterial for the purpose of vesting jurisdiction in the District Court to entertain the limitation proceedings, whether interest was allowable upon the value of the raft. The District Court simply exceeded its authority in inquiring into that question.

This court will not deny that if the demand of the brief were allowed by the Circuit Court, whether rightfully so or not, it would have entered a decree in appellee's favor in excess of \$140,000. And adjudged by the very principles which induced this court to sustain the District Court for the Northern District of California in the former limitation proceedings,* the District Court for Oregon should have held that it had jurisdiction to entertain the proceedings as a claim had been made in excess of the value of petitioner's interest in the two tugs. The moment that that claim was asserted, appellant had the right to invoke the jurisdiction of the District Court under the statute and the admiralty rules of the Supreme Court of the United States.

On the principles forming the basis of this court's decision in the former limitation proceedings,* and upon which the District Court for the Northern District of California dismissed said proceedings, appellant for the first time had the right to invoke the jurisdiction of a federal court in a limitation proceeding when the aforesaid claim was made by appellee in its brief. Up to that moment a claim had never been made either

*218 Fed. 161.

*218 Fed. 161.

verbally, by document, or before a court, in an amount in excess of the value of petitioner's interest in its said tugs at the close of their respective voyages on which said raft was lost. Appellant, therefore, was never before in position to invoke rightfully the jurisdiction of a federal court until it received the brief in which the demand was made, and thereupon with due promptness, it obtained jurisdiction by filing its petition.

The fact that appellee waited for five years before it increased its claim to an amount in excess of the value of petitioner's interest in the tugs, constitutes no reason for denying appellant the benefit of the jurisdiction of the federal courts.

Upon the making of the claim, the right to invoke jurisdiction attached and upon the institution of the limitation proceedings the first question which the District Court would have been called upon to decide on the trial would have been whether appellant was liable at all for the loss of the raft, and, secondly, if liable whether it had a right to a limitation of its liability.

Prov. & N. Y. S. S. Co. v. Hill Mfg. Co., 109 U. S. 578.

Manifestly, there was no more power on the part of the District Court at that stage of the proceedings to pass upon the validity of appellee's claim for interest for the purpose of determining appellant's right to jurisdiction than there was to pass upon the merits

of the claim of negligence in the loss of the raft. If it could pass upon one such claim, it could pass upon any number, and thus a principle would be enunciated whereby the right of a shipowner to invoke the jurisdiction of the federal courts in limitation proceedings, where a number of claims had been preferred in excess of the value of his interest in his vessel, would be determined by the court inquiring into the validity of each of the several claims, and by finally coming to the conclusion that there was but one valid claim of less than the amount of the value of the vessel, deny its jurisdiction.

We submit that the petition herein shows that appellee has made a claim against petitioner in excess of the value of its interest in the vessels alleged to be in fault, and that thereby and thereupon appellant became vested with the right to invoke the jurisdiction of the federal courts.

White v. Island Trans. Co., 233 U. S. 346;

The Tug No. 16, 237 Fed. 405;

Shipowners and Merchants Tugboat Company v.

The Hammond Lumber Company, 218 Fed. 161.

The District Court erred in dismissing the proceedings.

Appellee cannot defeat the District Court's jurisdiction by reducing claim.

Appellee having made a claim in excess of the appraised value of appellant's interest in said tugs "Dauntless" and "Hercules," and appellant having thereupon invoked the jurisdiction of the District Court

in a proceeding to limit its liability, the court cannot be ousted of such jurisdiction by appellee reducing its claim to an amount less than the value of appellant's interest in said tugs. This was settled by

The John K. Gilkinson, 150 Fed. 454, 457,

wherein the court said:

"But in any event, when a court once acquires jurisdiction in a matter of this kind, it cannot be divested of it by any act on the part of the plaintiff in attempting to reduce his claim."

The Tolchester, 42 Fed. 180.

The offer of appellee to reduce its claim becomes, therefore, ineffectual, but is significant in that the offer in itself is an admission of the existence of the claim.

The claim made by appellee exceeds the fund created by the bond for the value of appellant's interest in said tugs given in lieu of their surrender, and jurisdiction attached on filing of the petition.

Sec. 4 of the limited liability act of March 3, 1851, provides:

"The liability of the owner of any vessel, for any embezzlement, loss, or destruction, by any person, of any property, goods, or merchandise, shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, lost, damage, or forfeiture, done, occasioned, or incurred, without the privity, or knowledge of such owner or owners, shall in no case exceed the amount or value of the interest of such owner in such vessel, and her freight then pending." (Sec. 4283, U. S. Rev. St.)

The procedure by which the act was given operative effect was prescribed by Rules 54 to 58 of the Admir-

alty Rules of the United States Supreme Court. Rule 54 provides:

“When any ship or vessel shall be libeled, or the owner or owners thereof shall be sued, for any embezzlement, loss or destruction by the master, officers, mariners, passengers, or any other person or persons, of any property, goods or merchandise, shipped or put on board of such ship or vessel, or for any loss, damage or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned or incurred, without the privity or knowledge of such owner or owners, and he or they shall desire to claim the benefit of limitation of liability provided for in the third and fourth sections of the act of March 3, 1851, entitled ‘An act to limit the liability of shipowners and for other purposes,’ now embodied in sections 4283 to 4285 of the Revised Statutes, the said owner or owners shall and may file a libel or petition in the proper District Court of the United States, as hereinafter specified, setting forth the facts and circumstances on which such limitation of liability is claimed, and praying proper relief in that behalf; and *thereupon* said court, having caused due appraisement to be had of the amount or value of the interest of said owner or owners, respectively, in such ship or vessel, and her freight, for the voyage, shall make an order for the payment of the same into court, or for the giving of a stipulation, with sureties, for the payment thereof into court whenever the same shall be ordered: or, if the said owner or owners shall so elect, the said court shall, without such appraisement, make an order for the transfer by him or them of his or their interest in such vessel and freight to a trustee to be appointed by the court under the fourth section of said act; and, upon compliance with such order, the said court shall issue a monition against all persons claiming damages for any such embezzlement, loss, destruction, damage, or injury, citing them to appear before the said court and make due proof of their respective claims at or before a certain time to be named in said writ, not less than three months from the issuing of the same; and public notice of such monition shall be given as in other cases, and such further

notice reserved through the post-office, or otherwise, as the court, in its discretion, may direct; and the said court shall also, on the application of the said owner or owners, make an order to restrain the further prosecution of all and any suit or suits against said owner or owners in respect of any such claim or claims."

Upon filing its petition for limitation of liability in the United States District Court for Oregon, appellant elected not to surrender its tugs to said court (as it was not physically possible owing to their absence at sea), but to give a stipulation with sureties for the value of the interest of appellant in said tugs and their freight pending for the voyage on which said raft was lost, as authorized by the provisions of Rule 54. As the value of appellant's interest in said tugs at \$115,000 had become *res adjudicata* between appellant and appellee in the limitation proceeding previously had in the District Court for the Northern District of California, the District Court for Oregon* by an order duly entered fixed the amount of the stipulation to be given by appellant for the value of its interest in said tugs "Dauntless" and "Hercules", at \$115,000, which bond, with qualified surety, was filed with said court. The bond provided for the payment of interest on said \$115,000 from its date and not from the date of the loss of said raft. Unless the court was in error in not requiring said bond to carry interest from the date of the loss of said raft, it is manifest that the fund out of which appellant's claim, as preferred before said Circuit Court for Clatsop County, if established

*The District Judge was fully informed as to the details of the California proceedings. There was no concealment as intimated by appellee who was not present at the ex parte hearing.

against appellant, would be allowed, was less than the fund. On the other hand, if the bond should have carried interest from the date of the loss of the raft, and not from the date it was given, clearly the fund would have exceeded the claim as made, and thus, under the rule of this court in the former proceeding,* jurisdiction would not have attached. It has become a settled rule of law by the great weight of authority that the bond given for an owner's interest in his vessel in lieu of a surrender of the vessel, as authorized by Rule 54, shall not bear interest, save from its date.

In an early case the question was passed upon and the shipowner was compelled to pay interest on the claims from the date of the stipulation.

The Favorite, 12 Fed. 213.

That case was followed by

In re Harris, 57 Fed. 243,

in which the Circuit Court of Appeals for the Second Circuit affirmed a decree of the District Court requiring the owner of a tug to file a bond, with sureties, stipulating for interest from the date of the bond. The petitioner protested against being required to stipulate for interest, and thus the question was squarely presented to the courts, and of which Circuit Judge LaCombe said:

"Appellants contend that the District Court erred in requiring a stipulation for interest from the date of the bond upon the appraised value of ship and freight, and insist that in proceedings under the act of 1851, interest

upon such value can be exacted only from the date of the final decree. Several cases are cited in support of this contention, but they are not controlling, because in no one of them did the bond provide for interest and the obligors in a bond conditioned only to pay the stipulated value upon decree could not be liable for interest until the decree fixed their liability. But it is further contended that upon principle, the owners can in no event be held liable for anything beyond the value of the vessel and freight; that therefore the stipulation being for illegal interest is void, being unsupported by any consideration, upon the principle that stipulations given pursuant to law are not enforceable beyond the demands of the law, no matter what promises they may contain. The statement in appellant's brief that section 4 of the act of 1851 (now sections 4284, 4285, R. S. U. S.) says that all claims against the shipowner shall cease from and after the time when he surrenders his vessel, or gives a bond for her value, is not entirely accurate. The statute contains no provision for the giving of a bond. It is only upon a transfer of his interest in the vessel and freight to a trustee appointed by the court that claims against the owner are declared by the statute to cease. It is the 54th rule in admiralty which, presumably for the relief of the shipowner who might wish to put his vessel to some use, provides as follows:

* * * * *

'Under this rule the right to elect that he will transfer his interest and thus limit his liability in the way provided by the statute, is expressly reserved to the owner. If, however, he prefers to avail of the alternative offered by the rule, and to substitute the appraised value for the *res*, it is left to the discretion of the court to determine whether such value shall be paid into court in cash, or secured by a bond. If it is paid in cash the fund may be invested and increased by accumulations of income during the continuance of the litigation; and as the fund thus held by the court belongs to the creditors its increment, to the extent of their claims, will also belong to them. Where, however, it is not paid into court, it remains in the hands of the debtor, and for the use of a fund not belonging to him it is but fair and just that

he should pay.' (*The Favorite*, 12 Fed. Rep. 213.) In cases therefore where the owner elects not to transfer and asks to be allowed to receive the vessel upon stipulation to pay the appraised value of his interest at some future day, instead of substituting the money for the *res*, it is eminently proper that he should be required to stipulate for interest from the time when he thus releases his ship till the money which takes its place is required for final distribution among the creditors whose fund it is; and there is nothing in either the statute or the rule which expressly or inferentially forbids the court to require him so to do. The additional liability thus incurred arises, not because of the original offense but because the owner has chosen substantially to borrow from his creditors the money which, under the rule, is to take the place of the offending vessel."

It is plain from the foregoing decision that the rule requiring the stipulation to carry interest from its date does equal justice to shipowner and to claimant. It thereby imposes upon the shipowner no greater liability than if he surrendered his vessel as the rule permits, but by requiring the bond to carry interest from its date, it creates for the benefit of the claimants as large a fund as they would have if the vessel were surrendered and sold and the proceeds made to earn interest. Any other rule would work an injustice.

The principle announced in the foregoing case was followed by District Judge Butler in

The Battler, 58 Fed. 704,

wherein, in holding that the stipulation should bear interest on the appraised value from its date, and not from the date of the loss, he said:

"The claim to have interest added to the appraised value of the vessel from time of the sinking of the barges

‘Tonawanda’ and ‘Wallace’ to this date cannot be sustained. No case is found in which such a claim was allowed or made. In the *City of Norwich*, 118 U. S. 492, and *The Benefactor*, 103 U. S. 239, there was equal reason for such a claim. The terms of the statute and the rules prescribed in pursuance of it seem to forbid the demand. Assuming that the owners have not forfeited their rights by delay, as I do at present—the question not being raised—they are entitled to a discharge on turning over the vessel or paying her value into court. It is proper, however, that they should provide for the payment of interest on her value until such time as the money is paid, if they prefer to give bond, instead of paying it at present. I have no doubt of the court’s power to require this. It was so decided *In re Harris* by the Circuit Court of Appeals (2nd Circuit, 57 Fed. Rep. 243). The petitioners must therefore either turn over the vessel, pay in her appraised value, or enter into stipulation to pay it with interest at such time as it may be required.”

The principle was adhered to in

The George W. Roby, 111 Fed. 601.

In that case the steamers “Roby” and “Florida” were in collision on Lake Huron on May 20, 1897. The owner of the “Florida” and the insurers of her cargo libeled the “Roby”, whose owner thereupon filed a petition for limitation. The value of the “Roby” was appraised at \$59,300 and bond with surety for that amount was given and the vessel released. Both vessels were held in fault, but the liability of the owner of the “Roby” was limited. The insurer of the “Florida’s” cargo appealed upon the single ground that the court below erred in not construing the bond entered into by the owners and insuring the “Roby” as bearing interest from the date of its execution. Upon the

question thus squarely raised, Circuit Judge Lurton said:

"The District Court disallowed interest upon the bond given for the release of the 'Roby'. The 'Roby' was appraised at \$59,300 and a bond with surety executed for that amount by which the owners of the Roby and their surety bound themselves 'in the sum of \$59,300 unto whom it may concern that the said Lakeland Transportation Company shall abide and answer the decree of the court in said matter, and shall pay into the registry of the court said \$59,300 and the interest on the same as provided by law, the appraised value of the said steamer, whenever such payment shall be ordered and required by the court'. The District Court had undoubtedly authority to require that the owners of the 'Roby' as a condition of the release of their vessel should enter into a stipulation to pay the appraised value, either with or without interest when ordered. The authority for the release of a libeled vessel, or for a vessel surrounded upon an application for the benefit of the limited liability act is found in the 54th Admiralty rule. Under that rule the owners of a vessel seeking the benefit of the limited liability statute might convey their vessel to a trustee to be named by the court, or the court might appraise the vessel and require the value to be paid at once into court, or release the vessel upon a stipulation to pay the appraised value into court when ordered. If the appraised value had been at once paid into court the fund might have been made productive by lending it out at interest or by investing it in approved bonds. In such case the fund for ultimate distribution would have been enlarged. As such a course was open to the court, it is clear that it might, as a condition of release upon bond, require that the stipulators' bond should bear interest from date."

In

Smith v. Booth, 112 Fed. 553.

District Judge Adams of the Southern District of New York followed *In re Harris*, *supra*, and *The Bat-*

tler, supra, holding that a shipowner should be required to pay interest, not from the date of the disaster, as stated by appellee,* but upon the value of the vessel as it was at the time of the accident, and thus necessarily from the date of the bond. This appears from the following:

“The value of the ‘Mary Elizabeth’ was found to have been \$300.00. Upon a settlement of the decree, it is contended by the Lighterage Company that its liability is strictly limited under the act to \$300 and that it cannot be required to pay interest. The act provided, Sec. 4283, ‘the liability of the owner of any vessel * * * shall in no case exceed the amount or value of the interest of such owner in such vessel and her freight then pending’. In case of a surrender of the vessel an exact compliance with the act can be had and the liability of the owner then ceases. Where, however, the owner obtains an appraisement under the rules, it is established that the bond to be given should bear interest as a substitute for the benefit a surrender of the vessel would be to those entitled to it. The precise point here involved has not apparently been decided but it seems clear that a shipowner who resorts to an answer to establish his limitation should not be in a better position than where he surrenders the vessel or gives a bond, and in a case of this kind should be required to pay interest on the value of the vessel as it was at the time of or immediately after the accident.”

In the late case of

The Perry G. Walker, 216 Fed. 423,

District Judge Hazel of the Western District of New York held that interest should be paid at the reduced rate of 3% from the date of the filing of the report of the Commissioner fixing the damages. He did not even go back to the date of the filing of the bond.

The rule requiring the bond to bear interest from its date has been approved by *Benedict* in the following language:

"The shipowner may avoid the payment of interest on claims eventually found valid by the surrender of his interest to the trustee or the payment at once of the appraised value into court. The trustee will sell the *res* surrendered and place the proceeds at interest, and some interest is always received on deposits with the clerk. And the interest so accruing, which is usually not more than two or three per cent, is all of the interest on the claims which will be allowed to claimants. But if the petitioner prefers to retain the *res* and give a stipulation for its value, then the stipulation must include interest on the amount of the stipulation *from its date to the date* of final decree, and in the case of an unsuccessful appeal by the petitioner interest may be decreed against him personally. And this interest will run at the rate usual on stipulations, i. e., six per cent. And where a respondent who is sued personally sets up the defense of limitation of liability, which is sustained, but makes no surrender and gives no stipulation, interest will run against him at the usual rate on the value of the vessel as it was at the time of or immediately after the accident."

Benedict's Admiralty, Sec. 557.

And

Foster's Federal Practice, Vol. 2, p. 1999,

states the rule to be that

"When a bond or stipulation for value is given, interest runs from the date of the same".

In two cases

The H. F. Dimock, 77 Fed. 226,

and

The Cygnet, 126 Fed. 742.

following the former, interest was fixed from the date of the decree.

In

The Ocean Spray, 117 Fed. 971,

the accident which gave rise to the litigation occurred on February 12, 1896. The case was tried in the state courts of California and a verdict for \$3000 returned in plaintiff's favor. The California Supreme Court reversed the judgment and remanded the cause for a new trial. While pending in the state court, petition for limitation of liability was filed in the District Court for the Northern District of California. A stipulation for value was given, but it did not bear interest at all.

But one case, viz., that of

In re Starin, 126 Fed. 101,

so far as we are aware, in which the question of interest is discussed, holds that the stipulation for value should bear interest from the date of the loss. It has been contended by appellee that the practice in the District Court for the Northern District of California (but not in the District Court of Oregon) has been to require the bond to carry interest from the date of the loss, but an examination of many cases shows that while some stipulations have so provided, the practice has been by no means uniform.

For instance, in cause No. 13938, wherein the Hammond Lumber Company filed a petition for limitation of liability on November 28, 1908, for an accident occurring in April of that year, *interest was ordered from the date of the filing of the petition*. In *The Corona*, cause No. 13651, the bond bore interest from

its date. In the cases of *The Island Trans. Co.*, *The Coos Bay*, *Rose A. Martinez*, and in *The Progresso*, the bonds carried interest either from the dates of the filing of the petitions or from the dates of the bonds.

The decision in *The Acapulco*, No. 13784, simply enforced the terms of the bond, and did not purport to be based upon any established rule of law.

In *The Ocean Spray*, *supra*, and in *The Americana*, cause No. 15740, where the accident occurred in January, 1913, and the petition for limitation of liability was filed in November, 1914, the bonds did not carry interest at all.

And as for the rules enforced in the District Courts for the Southern and Eastern Districts of New York, the decisions in *In re Harris*, *supra*, and in *Smith v. Booth*, *supra*, show them to provide for interest from the date of the stipulation.

It is true that in the limitation proceedings in the District Court for the Northern District of California, the bonds filed by appellant carried interest from the date of the loss of the raft, but the question of interest was not there in issue and the bonds were made so to provide by the voluntary act of the petitioner.

That the bond for value should not be required to bear interest, except from its date is supported by the rule of reason. The statute (Rev. St. 4283) expressly provides that

“The liability of the owner of any vessel * * * shall in no case exceed the amount or value of the interest of such owner in such vessel and her freight then pending”.

It does not provide that it shall not exceed the amount or value of the interest of such owner in such vessel and interest thereon *from the date of the loss*. Nor does Rule 54 make any provision for interest. On the contrary, it expressly grants to a shipowner the right to transfer his interest in the vessel and freight pending to a trustee to be appointed by the court, or to give a stipulation for the payment into court of the value of the petitioner's interest in the vessel and her freight pending for the voyage. *It makes no reference and contains no requirement as to interest.*

As applied to the present case, appellant could, on the 21st day of July, 1916 (if it had been able to have had both of its tugs within the jurisdiction of the District Court for Oregon), have transferred said tugs to a trustee appointed by the court, and thereupon the court could have directed the sale of the same, and invested the money so as to have earned interest. Manifestly, if the tugs were then of the same value as on the date of the loss (which they were at least), they would have realized \$115,000, and thus the fund from which appellant's claim, if established, could have been paid would have been \$115,000 with whatever interest would have accrued from the date of the investment of the proceeds of the sale. Had the claim as preferred to the Clatsop County court been ultimately allowed, it would have amounted to more than \$140,000, and thus it is obvious that the claim would have exceeded the fund.

In reason, and in the absence of any express provision of either statute or rule, appellant should not have

been placed in any worse position by reason of having accepted and acted upon the alternative method expressly granted to it by Rule 54, by giving a stipulation for value instead of surrendering its tugs. Had the stipulation been required to carry interest from the date of the loss on the appraised value, it is manifest that appellant, by giving the stipulation instead of surrendering the tugs, would have been penalized in the increased amount which it would have been required to pay. Clearly, such a rule would be inequitable.

The only rule which can work exact justice in an enforcement of the rights granted to shipowners by the statute and the Admiralty Rules of the Supreme Court is the one which would require the stipulation for value to carry interest from its date and not from the date of the loss. We submit, therefore, that this court should in that regard follow the uniform rule which has been laid down in the cases already cited.

The fact that the present limitation proceedings were not instituted until five years after the loss of the raft (partly of appellee's making) constitutes no reason why the rule so firmly established by great weight of authority should be set aside. The law authorizes them at any time before satisfaction of judgment.

The Benefactor, 103 U. S. 239.

Appellant made a *bona fide* attempt to maintain a limitation of liability proceeding, and had it not been so vigorously opposed by appellee in its strenuous efforts to prevent the merits of its claim of liability for

the loss of the raft from being determined by the federal courts in their admiralty jurisdiction, appellee's rights would have been long since determined. But appellant's efforts in that regard were defeated by the decision of the District Court for the Northern District of California, and of this court upon the express ground that the value of petitioner's interest in the tugs exceeded the amount of the claim as then made. The moment that appellee increased its claim and made it in excess of the value of appellant's interest in its tugs, the latter invoked the jurisdiction of the federal courts. The fact that petitioner waited for five years before it made a claim sufficient to confer upon appellant the right to federal jurisdiction, was not of appellant's making, and for it appellant should not be penalized by applying a rule contrary to settled authority, which would require it to give a stipulation carrying interest from the date of the loss, and thus place it in a worse position than were it to exercise its right under Rule 54 by surrendering the tugs.

Dyer v. National Steam Nav. Co., 118 U. S. 507, decides nothing adverse to appellant's contention, for it neither held nor intimated that it was proper for the bond to carry interest. When speaking of the allowance of interest on damages, the court was not referring to the stipulation of value as damages.

In reason, we submit, the District Court of Oregon was right in entering an order directing that the stipulation for value carry interest from its date. Thus, claim having been made before the Circuit Court for

Clatsop County in excess of the value of appellant's interest in said tugs, viz., \$115,000, jurisdiction vested on the filing of the petition. The District Court, we submit, should thereupon have proceeded with the trial of the cause and have determined in accordance with the rule laid down by the Supreme Court of the United States in

Providence & New York S. S. Co. v. Hill Mfg. Co., 109 U. S. 578,

the questions first, whether or not appellant was liable at all for the loss of the raft, and, secondly, if liable whether it had a right to a limitation of liability.

The proceedings in the District Court for the Northern District of California were not pending as against appellee, and the District Court for Oregon erred in holding that petitioner's remedy, if any, was by application in said proceedings.

On the 13th day of January, 1914, the District Court for the Northern District of California, following its decision in the limitation of liability proceedings therein pending, entered a decree in which it ordered, adjudged and decreed "that the said petition be dismissed as to the said Hammond Lumber Company, claimant herein, and that said petitioner take nothing as against said Hammond Lumber Company by the said petition"; "that said Hammond Lumber Company do have and recover its costs herein"; and "that the above order and decree shall in no wise affect the rights of the petitioner here acquired, if any there be, against any other persons entitled to file claims herein, if any there be."

On appeal this court affirmed the decree of the District Court. Thus it is clear that those proceedings were terminated so far as the present appellee was concerned, *for the affirmed decree of the District Court expressly dismissed the petition as to appellee.* It would seem, therefore, to be beyond argument that said limitation proceedings, at the time of the filing of the petition in the District Court of Oregon, were not pending as against appellee. Whether they were effectually pending as against any other claimant is beside the question for as against the Hammond Lumber Company they were dismissed.

While it is true that the decree provided that it should in no wise affect the rights of petitioner, if any there were, against any other persons entitled to file claims therein, it was ineffectual and cannot be said to have kept the proceedings alive at the time of the filing of the petition herein so as to have made it possible to have brought appellee in by supplemental petition.

In the original petition filed in the District Court for the Northern District of California, appellant (petitioner therein) set forth all of the material facts pertaining to the loss of said raft, including a reference to the suit pending in the Circuit Court for Clatsop County, but it did not allege, as it knew of no facts to justify it, that there might be other claims than that of appellee resulting from the loss of said raft. It prayed, however, for a monition citing all parties to appear in the proceedings, and claimed a right to a limitation of liability as against the same. The monition was issued, and appellee alone presenting a claim,

an order of default was entered as against all the world. And the decision of this court affirming the dismissal of the petition was expressly grounded upon the finding that *it was inconceivable that any claim other than that of the owner of the raft could possibly arise.*

The argument now is that notwithstanding that the denial of appellant's right to proceed in the federal courts in the former proceedings was expressly grounded upon the finding that *it was inconceivable that there could be any other claim than that of the owners of the raft*, the proceedings were pending despite the dismissal, and that the order of default was ineffectual to terminate the proceedings as against all the world other than appellee, because a further decree should have been taken under Admiralty Rule 29, after proof in the District Court that appellant was entitled to a limitation of its liability. In other words, in a case wherein the court found that there could not possibly be more than one claim, and a default had been taken as against all the world other than the one claimant, appellee would apply Admiralty Rule 29, as requiring appellant to go before the District Court and try out *ex parte* the question of its liability for the loss of the raft, and its want of privity therein. The suggestion is positively absurd, and it is inconceivable that this court will entertain the suggestion that the District Court would have undertaken such a hearing.

Admiralty Rule 29 has no reference to limitation proceedings, and no such intended application, but does apply to those cases of default in admiralty causes wherein an affirmative judgment for damages is sought.

Very properly on a default judgment, damages would not be awarded as prayed for in the libel until further proof of the actual loss was made, and this is as far as the rule can be made to go.

Cape Fear Trans. Co. v. Pearsall, et al., 90 Fed. 435,

wherein the court said:

“The default admits all the facts stated in the pleading, but it does not admit the amount of unliquidated damages claimed.”

If the former case was one in which this court’s decision was right *because it was inconceivable that there could be any other claim than that of owner of the raft*, and as the proceedings were dismissed as against the only claim that could possibly arise therein, then it will be straining at justice for this court to hold now that those proceedings were effectually kept alive despite their dismissal and the default, so that the Hammond Lumber Company could be brought into them by supplemental petition, at the time the petition herein was filed with the District Court of Oregon. If they were effectually pending, it was not because the District Court for the Northern District of California *anticipated* that the Hammond Lumber Company might increase its demand so as to exceed the value of appellant’s interest in its two tugs, *but because of other possible claimants*; and yet if there were other conceivable claimants, *then the decision of this court was wrong and worked an injustice to appellant when it denied to it the jurisdiction of the federal courts in a proceeding wherein, under those circumstances, it had*

the right to be heard. For this court now to hold that the proceedings remained effectual despite the finding upon which it grounded its decision, that there could inconceivably be no other claim than that as against which they were dismissed, then it would be guilty of an inconsistency which manifestly will do the greatest injustice to appellant. If there could conceivably have been any other claim than that of appellee for which those proceedings could be kept alive despite the default, then this court erred in denying to appellant the right to the jurisdiction of the District Court for the Northern District of California which it had invoked. It is not a sufficient answer to say that no showing was made in appellant's first petition of facts which would establish the possibility of other claims, because, unless appellant was willing to allege as a fact something not known to be a fact, it could not truthfully state a knowledge of the possibility of other claims.

And yet, after having successfully induced the District Court for the Northern District of California and this court to deny appellant the right to their jurisdiction, because the case was one in which there could conceivably be no other claims, appellee has now the temerity to suggest to this court that *the proceeding was one in which there might be other claims, "such as fishermen whose nets had been torn by the loosened logs of the raft, and owners of smaller or larger craft which might have been injured by such logs of the raft."**

*Appellee's Brief, page 31.

Appellee is driven to the necessity of this contention to maintain that the former limitation proceedings were still pending, so that appellant should have proceeded therein.

If it were the fact that there was the possibility of other claims, such as appellee now suggests, and of which appellant had no knowledge, then the District Court for the Northern District of California and this court, at the instance of appellee, did an injustice to appellant in the former proceedings because there is no decision in all the legal history of limitation of liability proceedings holding that in a case where there may be a number of claims in excess of the value of the owner's vessel, the right to invoke the jurisdiction of the federal courts will be defeated by the failure of all claimants, other than one of lesser amount than the value of the vessel, to appear and file the claims in the proceedings. It is undeniable that it is sufficient to give jurisdiction to the district court that there be the possibility of more than one claim in excess of the value of the petitioner's interest in his vessel. And if this were not so, then this court would not have made the statement upon which it grounded its former decision in pointing out that the case was one in which there could be by no possibility more than one claim.

For this court to hold now that appellant, if it was to invoke the jurisdiction of *any* federal court in a limitation of liability proceeding as against appellee, was required to proceed in the former proceedings pending in the District Court for the Northern District

of California, wherein it had already given bonds in the sum of \$115,000, with interest from the date of the loss, would manifestly work an injustice to appellant, because it would require it to respond in payment of appellee's claim in an amount greater than the value of petitioner's interest in its said tugs.

To make this clear, let us assume that appellee had increased its claim in the Circuit Court for Clatsop County by amending its complaint so as to have alleged damages in the sum of \$140,000, and thus have eliminated any possible question as to its having made a claim in that amount. If that claim had been made at the time of the trial of the cause in November, 1915, and if this court's decision in the former proceeding was right, then manifestly appellant could not have invoked the jurisdiction of the federal courts in a limitation proceeding until the moment of the increased demand. Under the Admiralty Rules of the Supreme Court, it could have then surrendered its tugs and have limited its liability to their value of \$115,000. On the other hand, if appellant was required to bring appellee into the proceedings pending in the District Court for the Northern District of California, and to respond on the bond which it had previously filed therein, it would be required to pay on appellee's demand of \$140,000, if valid, an amount in excess of the value of its interest in said tugs, for \$115,000, with interest thereon at six per cent. from September 9, 1911, to the date of the enlarged demand, would have increased appellant's liability to over \$140,000. And that is precisely the rule which appellee is seek-

ing to have this court apply in the present instance, for, notwithstanding that under the former decision of this court appellant could never before rightfully invoke the jurisdiction of a federal court in a limitation proceeding, and notwithstanding that the proceeding which it instituted was dismissed as against the Hammond Lumber Company because it was a case in which it was inconceivable that any other claim than that of the owner of the raft could possibly arise, the effect of appellee's contention is to hold that appellant's liability has been enlarged by the amount of interest accumulated since the date of the loss.

If that is to be the rule of law which this court is going to announce, then it will forever lay down a principle which will deny to a shipowner the benefit of the statute which limits his liability to the value of his interest in his vessel. That is exactly what will result in the present instance if appellee's contention is successful as to the actual pendency of the limitation proceedings in the Northern District of California as against appellee. We submit that the contention does not stand the test of reason, and that this court, to be consistent with the position which it took in its former decision, should hold that the limitation of liability proceedings in the District Court for the Northern District of California were finally dismissed as against appellee, and that the District Court of Oregon erred when it held that they were still pending and that appellee should have been brought therein by supplemental petition.

There is nothing in the authorities cited on pages 31 to 43 which cures the error of appellee's present contention.

The decision of this court in

Dodwell et al. v. U. S. Dist. Court for the Northern Dist. of California et al., 139 Fed. 444,

is decisively against appellee's contention, for if the proceedings were therein terminated not only as against those who were before the court, but as against those whose defaults had been entered, although the petition of the steamship company had not in terms been dismissed, then the proceedings in the District Court for the Northern District of California were closed so far as the Hammond Lumber Company was concerned, because as to it *the petition of appellant was expressly dismissed*. This clearly appears in the following excerpt from the opinion of the court:

"The District Court, after having closed up the proceedings in so far as the parties before the court were concerned, and entered its final decree, from which no appeal was taken, had completed its work, and thereafter had no power or authority to 'open up the proceedings' for the purpose of allowing other claimants, who had not appeared therein, to come into the case, have another commissioner appointed to fix the value of the claimants' loss, and determine their rights in that proceeding. *If an action in admiralty is, for any cause, dismissed, it is no longer in court, and the parties thereto are no longer before the court, and its jurisdiction therein is at an end.* The Illinois, Fed. Cas. No. 7003, and authorities there cited.

It is true that *the petition of the steamship company had not in terms 'been dismissed'*, but by the decision of this court it had been declared, under all the facts and

circumstances of the case, to be without merit, and directions were given to the District Court—

‘To enter judgment against the petitioner denying its application for a limitation of liability, and in favor of the respective claimants for the full amount of damages it had heretofore awarded them, with interest and costs.’ In re Pacific Mail S. S. Co., *supra*.

The District Court having followed these directions, and the proceedings having come to an end before the application of these petitioners was made, the District Court properly denied their application.”

Upon appellee’s increasing its demand to an amount in excess of the value of appellant’s interest in its said tugs, the latter not only had the right to invoke the jurisdiction of a federal court, but under Rule 57 of the Admiralty Rules it was required to file its petition in the District Court of Oregon, wherein the action in Clatsop County was pending, because it could only invoke the jurisdiction of other district courts by commencing its proceedings at a time when both of its said tugs, “Dauntless” and “Hercules”, were within the jurisdiction of such court, a condition not capable of accomplishment in the present instance, for its said tugs were engaged upon the high seas.

For the reasons assigned, we submit that the District Court erred in dismissing the petition.

The Circuit Court of Appeals has jurisdiction to review on appeal the decision of the District Court.

The District Court in its memorandum decision decided:

(a) That the petitioner’s remedy, if any, was by an application to the District Court for the Northern

District of California, by supplemental petition or otherwise, to have the Hammond Lumber Company brought in and made a party to the limitation of liability proceedings therein pending;

(b) That those proceedings had been instituted by the petitioner and were still pending in that court at the time the petition was filed;

(c) That the proceedings had been dismissed as to the Hammond Lumber Company on the ground that its claim as then asserted did not exceed the value of the tugs, but that jurisdiction over the proceedings was retained;

(d) That it was within the power of that court to have caused the Hammond Lumber Company to be brought in if it subsequently asserted a claim in excess of the fund;

(e) That such was the petitioner's remedy and not by the commencement of new proceedings in the District Court;

(f) That the claim as made by the Hammond Lumber Company in the state court did not exceed the fund;

(g) That the amount of such claim was to be determined by the state of the pleadings and the amount claimed therein, and not by the estimates or assertions of counsel in an argument based on his construction of the testimony and the law made in a brief after the case had been submitted;

(h) That the action in the state court was to cover unliquidated damages, and interest, as such, is not

recoverable in the state of Oregon on such a demand; and

(i) That the exceptions and motion would be allowed and the petition dismissed.

It is thus manifest that the questions passed upon and determined by the District Court were other than that of its jurisdiction as a federal court to take jurisdiction of the subject-matter. The court's ruling was made upon exceptions which challenged the sufficiency of the facts alleged in the petition to warrant a limitation of liability. The decision of the court not only proceeded upon exceptions in the nature of a demurrer, rather than upon a plea to its jurisdiction as a federal court, but also determined that the District Court for the Northern District of California instead of the District Court of Oregon was the proper court, if any, in which appellant should have proceeded. The questions thus passed upon and determined went to the merits of the petition as stating a right to prosecute a proceeding for limitation of liability in that court, instead of to its jurisdiction as a federal court. This was pointed out by the Supreme Court in the case of

Fore River Shipbuilding Company v. Selma T. Hagg, 219 U. S. 175; 55 L. Ed. 163,

wherein Mr. Justice Day, delivering the opinion of the court, said:

"The court has had frequent occasion to determine what is meant in the statute providing for review of cases in which the jurisdiction of the court is in issue, and it has been held that the statute means to give a review, not of the jurisdiction of the court upon general

grounds of law or procedure, but of the jurisdiction of the court as a federal court."

It is a settled rule of law that the exclusive jurisdiction of the Supreme Court to review a decision of the District Court is confined to those cases dismissed by a District Court either for want of jurisdiction of the parties, or want of power as a federal court to take jurisdiction of the subject-matter *without* involving the decision of any other question.

The cases which appellee cites in support of its contention were all cases in which the question for review was that of the power of a federal court to take jurisdiction of the subject-matter as a federal court, or where the only question presented for review was on a certificate going to the jurisdiction, without the assignment of other error.

Here, however, error has been assigned to the court's rulings upon matters other than those touching the court's jurisdiction as a federal court. The court passed on matters which went to the merits of the petition, as, for instance, that a claim had not been made in excess of the fund; that the claims were to be determined by the pleadings, and not by the assertion of counsel; that the action in the state court was to recover unliquidated damage, and that the interest on the same was not recoverable in the state of Oregon; that petitioner's remedy, if any, was by an application to the District Court for the Northern District of California; that the proceedings in the latter court were still pending; that jurisdiction over the proceed-

ings has been retained and that it was within the power of the District Court for the Northern District of California to have caused the Hammond Lumber Company to be brought in by supplemental petition, and that such was the petitioner's remedy, and not by the commencement of new proceedings in the District Court for Oregon.

There can be no question but that the District Court for Oregon has jurisdiction of proceedings for limitation of liability in its admiralty jurisdiction, but the questions which it has determined in this cause went far beyond that, for it concededly assumed jurisdiction to determine the matters hereinbefore enumerated. And the errors in those determinations, this court, and this court alone, has the power to review. The controlling rule touching the questions herein involved are considered at length in a comprehensive opinion of the Circuit Court of Appeals for the Third Circuit in

Morrisdale Coal Co. v. Penn. R. Co., 183 Fed. 929, 938,

in which a majority of the Supreme Court decisions bearing upon the subject are exhaustively reviewed. This decision was subsequently affirmed by the Supreme Court in 230 U. S. 304; 57 L. ed. 1494.

The rule was well stated by the Circuit Court of Appeals for the Sixth Circuit in

Olds v. Herman H. Hettler Lum. Co., 195 Fed. 9, 11,

wherein Circuit Judge Denison said:

"The motion calls for the application of well-established rules to circumstances peculiar only in one respect. It is

well settled that, where the only question properly raised on the assignments of error is that of the jurisdiction of the trial court, this court cannot review, but such writ of error must be taken directly to the Supreme Court (*Remington v. Cent. Pac. R. R.*, 198 U. S. 95, 97; 25 Sup. Ct. 577; 49 L. ed. 959; *Coler v. Grainger Co.* (C. C. A. 6) 74 Fed. 16, 21, 20 C. C. A. 267; *Kentucky State Board v. Lewis* (C. C. A. 6) 176 Fed. 556, 100 C. C. A. 208); and also that if the trial court did decide, and if the assignments of error do fairly raise an independent question of general law as well as the question of jurisdiction, then this court has power to hear and decide all the questions. *Boston & Maine R. R. v. Gokey*, 216 U. S. 155; 28 Sup. Ct. 657; 52 L. ed. 1002, and cases cited. See, also, review of decisions in *Morrisdale Co. v. Pennsylvania Co.* (C. C. A. 3) 183 Fed. 929, 938, 106 C. C. A. 269." (Italics ours.)

In *United States v. Larkin*, 208 U. S. 333; 52 L. ed. 517 the writ of error was dismissed, Chief Justice Fuller delivering the opinion of the court, saying:

"District courts are the proper courts of the United States to adjudicate forfeiture and the question involved was not the jurisdiction of the United States courts as such, but whether this District Court had jurisdiction or the District Court for the Southern District of New York." (Italics ours.)

That was precisely one of the questions determined by the lower court when it held that the petitioner's remedy, if any, was by an application to the District Court for the Northern District of California and not to the District Court of Oregon. That ruling is assigned as error and is one which can only be reviewed by this court.

See also *Meeker v. Lehigh Valley R. Co.*, 183 Fed. 548; *National Pole Co. v. Chicago & N. W. Ry. Co.*, 211

Fed. 65; *Smith v. Farbenfabriken of Elberfeld Co.*, 203 Fed. 476; *The Presto*, 93 Fed. 522; *A. J. Phillips Co. v. Grand Trunk Western Ry. Co. et al.*, 195 Fed. 12.

Appellee comments upon the fact that appellant did not assign as error the District Court's consideration of the motion to dismiss, and affidavits submitted in connection therewith.

On the authority of

The Tug No. 16,* 237 Fed. 405,

there seems to be no question but that the court erred in receiving and considering the affidavits, but appellant has not assigned error thereto because it desires to have the case determined by this court upon its merits and not upon technicalities.

We respectfully submit that for the foregoing reasons the District Court erred as assigned, and that its decree should be reversed with instructions to proceed in accordance with the usual practice in limitation of liability proceedings as prescribed by the Admiralty Rules of the Supreme Court of the United States.

Dated, San Francisco,

March 4, 1918.

IRA A. CAMPBELL,

E. B. TONGUE,

SNOW, BRONAUGH & THOMPSON,

McCUTCHEN, OLNEY & WILLARD,

Proctors for Appellant.

* This case discusses this court's decision in the former limitation of liability proceedings and upholds the decision on the theory that it was a case in which there could be but one claim.